

*United States Court of Appeals
for the Second Circuit*



**PETITION FOR
REHEARING**

76-1210

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - - X

UNITED STATES OF AMERICA, :

Appellee, :

v.

AL TAYLOR, WILLIAM TURNER, CHARLES
RAMSEY, RUFUS WESLEY, HENRY SALLEY
and AL GREEN,

:

:

Appellants. :

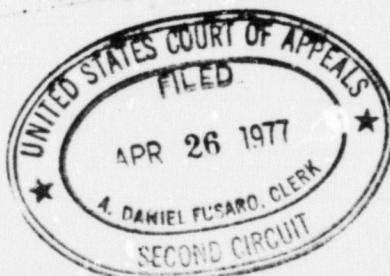
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Pls

On appeal from the United States District Court
for the Southern District of New York

PETITION FOR REHEARING OF APPELLANT
RUFUS WESLEY

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CASES

	<u>Page</u>
Pointer v. United States, 151 U.S. 396, 408, 409 (1894)	2

STATUTE

Federal Rules of Criminal Procedure 43	2
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PETITION FOR REHEARING OF APPELLANT
RUFUS WESLEY

Rufus Wesley petitions the above-entitled court for a re-hearing and a rehearing en banc based upon issues overlooked and/or misconsidered by this Court's opinion of April 13, 1977. The following issues are urged:

- 1) The name of Rufus Wesley has been omitted from the title of the slip opinion of the case.
- 2) This Court has erroneously ruled that there is no prejudice in the trial court's denying a defendant his constitutional and statutory right of peremptory challenge to alternate jurors even where the record shows that three of the four alternates chosen sat on the final jury panel. So it is absolutely clear the Court's ruling deprived the defendants of any challenges

directed specifically to the alternates. Appropriate and timely objections were made and the right denied.

The effect of this decision is to deny the constitutional right of peremptory challenge. See Pointer v. United States, 151 U.S. 396, 408, 409 (1894).

3) This Court has erroneously ruled that a defendant's constitutional and statutory right (F.R.C.P. 43) to be present at all times at the trial may be properly denied him if he is arrested in another jurisdiction and is absent because in custody. Even though the defendant Wesley at no time waived his right to be present during these three days, even though there was testimony concerning him, and even though the rereading or recalling of witnesses before the jury could only additionally prejudice him, this Court ruled that his rights were not violated -- or if so the error was harmless.

4) This Court has failed to assess the serious situation established by the court's communication with a juror out of the presence of counsel and defendants during deliberation. Not until counsel was privy to this Court's opinion did it learn that the communication concerned a request by a juror to withdraw from the deliberations by reason of a death in his family.*

* Slip opinion p. 2840 fnote 13

Under the circumstances related in item "4", including the fact that a memorandum dictated by Judge Duffy at the time became lost and a new memorandum of what transpired was dictated by him eleven months later, the true prejudice of the event can never be truly assessed.

Moreover if, in fact, the juror sought to withdraw even momentarily from the deliberations, all counsel were misled. The transcript of the record cited in the government's brief pp. 81, 82 reads:

THE COURT: The man is willing to serve. He is serving well. That is all you need to know. His personal problems are none of your business; in fact, ~~it~~ ^{it} is none of mine.

I feel at this point almost under a seal of confession, and I am not going to disclose it to you or anybody else, and that is it, the end.

MR. ENGEL: Your Honor, may I just inquire:

I take it Mr. Allen's personal problem has nothing whatsoever to do with the deliberations --

THE COURT: I already said that.

MR. ENGEL: -- and with any time problem.

THE COURT: I already said that.

MR. ENGEL: That is all I wanted to hear.

MR. SCHMUKLER: I am not sure that has been said. We were concerned because the juror approached the bench to speak to your Honor two or three times --

THE COURT: Wait a second: I already said that. It's finished, it's over, it's done with.

* * * * *

MR. ENGEL: I would like to note for the record that Mr. Allen, when leaving [for] the jury room on two occasions, I remember, perhaps three, left the box and went up to your Honor, and spent perhaps fifteen, thirty seconds talking to your Honor, and left, and your Honor's statements today indicate whatever Mr. Allen said, they had nothing to do with any time impingement or any problem as to the length of the deliberations.

THE COURT: I said it once. You don't have to repeat it.

God have mercy.

CONCLUSION

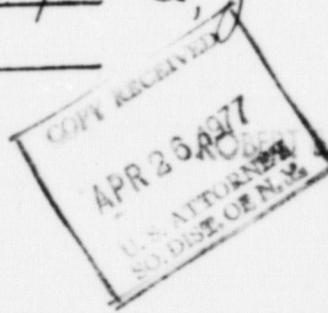
Under all these circumstances, appellant Wesley requests reconsideration of the issues raised.

Respectfully submitted,

ELEANOR JACKSON PIEL
Attorney for Appellant
Rufus Wesley

2 Copies Received
Date April 26, 1977
Firm Hon. Robert B. Fiske, Jr.

By _____



FISKE JR.